No. 15937

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HOWARD-COOPER CORPORATION, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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JURISDICTION

This case is before the Court on petition of the National Labor Relations Board to enforce an order issued against respondent on February 5, 1957 and officially reported at 117 NLRB 287 (R. 31–36, 7–29).[1] This Court has jurisdiction under Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*, Appendix, *infra*, pp. 16–18), the unfair labor practices having occurred in respondent's plant in Central Point, Oregon, one of several plants in Oregon and Washington where respondent, admittedly in interstate commerce, sells and services industrial and farm machinery (R. 8–9; 3–4, 39–40).

[1] References designated "R." are to the printed record. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

STATEMENT OF THE CASE

In the instant case the Board found that respondent violated Section 8 (a) (1) of the Act by offering the employees at its Central Point plant material inducements to repudiate union representation, by fostering an anti-union petition which was circulated among these employees, and by threatening a shutdown in the event of unionization. The Board also found that respondent had engaged in a refusal to bargain, in violation of Section 8 (a) (5) and (1) of the Act. Respondent's principal defense on this phase of the case was that the Union (International Union, UAW, AFL–CIO) had not been designated as bargaining representative by a majority of the 12 employees comprising the appropriate bargaining unit. The Board's findings and the supporting evidence relating to the foregoing matters are here briefly summarized:

I. The Board's findings of fact

A. The Union's organizational campaign and respondent's counter-measures

On or about November 7, 1955, Harry Whiteside, a Union representative, distributed organizational leaflets, with Union authorization cards attached, to the employees at respondent's Central Point plant (R. 10; 41–44). During the ensuing week or ten days a number of the employees, comprising what the parties agreed and the Board found to constitute an appropriate bargaining unit, mailed or delivered signed authorization cards to Whiteside (R. 10, 20; 42).[2]

[2] The Board, like the Trial Examiner, found that seven, or a majority, of the 12 employees comprising the appropriate unit had authorized the Union to represent them (R. 32–34). Re-

At a Union meeting held on November 16, however, the employees present requested that the Union delay notifying respondent of its designation as bargaining representative until after the Christmas and New Year holidays as they did not want to risk forfeiting certain benefits which the Company might extend during these holidays (R. 10; 42, 44, 121, 131–132, 162–163). The Union honored this request and withheld any notification to respondent until January 4 (R. 10; 46–48). On that date Whiteside wrote to respondent at its Central Point plant and requested recognition and negotiations for a contract (R. 10–11; 47–49). Respondent made no reply to the letter (R. 11; 49). Accordingly, on January 10 Whiteside filed a petition with the Regional Office of the Board asking for certification of the Union as bargaining representative (R. 11; 49–54).

On January 11, Parker, respondent's vice-president and general manager of its branch operations, and Thomas, respondent's sales manager, who were making a tour of respondent's branch plants, were at the Central Point plant (R. 11; 82, 87, 96–97, 100). Parker was aware at this time of the Union's request for recognition and bargaining (R. 11; 83–84). Thrash, shop foreman at Central Point, summoned the employees to his office where they met with Parker, Thomas, Thrash, and Heaton, manager of the Central Point plant (R. 11; 132–133). Parker told the assembled employees he understood there was trouble and dissension in the plant; that unions tended

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spondent, as already indicated, challenges this finding. See, *infra*, 12.

to lead to hard feelings, strikes, physical violence, and economic hardship; that while unions were all right in their proper place, respondent had few labor difficulties, its doors were always open for complaints and he, Parker, did not know why the employees had authorized the union to represent them (R. 11–12; 101–102, 134, 157).

Following these introductory remarks, Parker invited the employees to voice any grievances they had (R. 12; 102). After some hesitation, one employee raised the question of a "coffee break" and stated his understanding that this was allowed at other branch plants (R. 12; 103). Parker suggested that the employees discuss it with the branch manager and that the latter's decision would be controlling (*ibid.*). A ten-minute coffee break was instituted immediately after Parker's visit (R. 12; 160, 189). Other problems were also raised relating to such matters as the furnishing and laundering of coveralls, health and accident insurance, and maternity benefits (R. 12; 103–108, 135–136). So far as appears, no action was taken relative to these matters. But when Employee Hennegar complained that an employee had to work six months before receiving paid holidays, Parker announced that he, Parker, would "take care of that right there" (R. 12–13; 188). Parker also announced during the meeting that respondent had earlier decided to grant a ten-cent hourly increase to employees at all its branch plants, but questioned whether the raise could be granted at Central Point with the Union "in the picture" (R. 13; 105). Parker, however, did not announce the impending wage increase

at any other branch plant, although he was touring all the Oregon branch offices during this period (R. 106–107).

Immediately following Parker's visit, Foreman Thrash held individual interviews with some of the employees (R. 13; 140–141, 175–177, 208). In the course of his interview with Employee Hennegar, Thrash pointed out that on a previous occasion the plant was closed down because the employees had voted for union representation (R. 13; 193).

In addition, on the day following Parker's visit, a petition, addressed to the Regional Office of the Board, was posted in the plant (R. 14; 143, 74). The petition, copies of which were sent to Union representative Whiteside and respondent, read as follows (R. 74):

> The undersigned employees of Howard Cooper Corp., Central Point branch respectfully petition that no action be taken regarding union organization and representation for this shop. Said employees have met with company officials and reached an agreement regarding wage conditions and wages and do not desire to make a union affiliation at this time.

The petition was the result of conferences between Foreman Thrash and Employee Donald Squire and Charles A. Brown, Jr. (R. 14; 165, 177–179). Responsive to Parker's earlier suggestion, confirmed by Thrash, that the effectuation of the proposed wage increase at the Central Point plant was doubtful because of the Union, Squire, Brown, and Thrash agreed that a petition would be the proper procedure to follow to insure the obtaining of the wage increase

(R. 14–16; 165–166, 177–180). Brown had the petition typed in Thrash's office, obtained the address of the Board's Regional Office from respondent's office manager, and on the afternoon of January 12 posted the petition next to the time clock (R. 15; 178–183).

Only two employees, Squire and McCoy, neither of whom had signed Union authorization cards, signed the petition on January 12 (R. 16; 143–144). Employee Bishop, who returned to the plant from a field assignment late that afternoon, saw the petition and that evening met with Union Representative Whiteside to ask what the employees who had signed Union authorization cards should do with respect to the petition (R. 16; 142, 144–145). Whiteside replied that in his view—he had not seen the text of the petition—the purpose of the document was to discover the identity of the Union adherents and advised that all these employees should sign the petition (R. 16; 145, 57–58). Bishop passed this advice on to the employees who had signed Union authorization cards and on the following day seven additional signatures were added to the petition, making a total of nine (R. 16; 145–146, 162).

In his meeting with Bishop, Whiteside also told Bishop that the Union would write respondent agreeing to the wage increase (R. 16; 57). The letter was written under date of January 14, and respondent thereupon effectuated the wage increase with respect to the Central Point plant along with the other branch plants, making it retroactive to January 9 (R. 16; 58–61).

B. The Union's majority status

As already indicated, the parties stipulated and the Board found that all employees employed by respondent at the Central Point plant to service, repair and maintain tractors and heavy machinery, with certain inclusions and exclusions not material here, constituted a unit appropriate for purposes of collective bargaining (R. 20; 40). Of the twelve employees comprising the appropriate unit, six testified that on or before the Union meeting of November 16, 1955, they signed cards authorizing the Union to represent them (R. 21, 31; 121, 151, 173–174, 184–185, 197, 204–205).[3]

A seventh employee, Richard Hachenberg, was serving on National Guard duty at the time of the hearing and did not testify. However, evidence was adduced that, when Employee Bishop called at Hachenberg's home on the evening of November 16 to offer Hachenberg a ride to the Union meeting, Hachenberg gave Bishop a signed Union authorization card for transmittal to Whiteside that evening, and that Bishop did deliver the card in question to Whiteside that evening (R. 22, 33; 45, 127). Later that

[3] Two of the six employees testified that, when they originally signed the authorization cards, they understood that the cards were merely for the purpose of holding a union meeting (R. 195–196, 202–203). The two employees admitted, however, that at the Union meeting of November 16 which they attended, they understood that the cards had the effect of designating the Union as their bargaining representative (*ibid.*). They did nothing then or thereafter prior to the petition of January 12, which could reasonably be construed as revoking or modifying their assent to representation by the Union (R. 22).

evening Hachenberg appeared at the Union meeting (R. 22, 33; 131).[4]

On January 13, Bishop informed Hachenberg, as directed by Union Representative Whiteside, that Union adherents should sign the anti-Union petition of January 12 in order to protect themselves (R. 145–146). Hachenberg, along with the six other adherents, affixed his signature to the petition as already indicated, p. 6.

On or about January 16, the employees gave Whiteside a detailed report concerning Parker's visit to the plant on January 11 and the benefits which had been granted as a result of that visit (R. 17; 64). Whiteside thereupon declined to enter into an agreement for a consent election upon its petition for certification and on January 23 filed the unfair labor practice charges giving rise to the instant proceeding (R. 17; 75).

II. The Board's conclusions and order

Upon the foregoing facts the Board, like the Trial Examiner, found that respondent, upon learning of the Union's claim for recognition and bargaining rights, interfered with, restrained, and coerced its em-

[4] The testimony as to the attendance at the meeting was somewhat in conflict. Whiteside testified that seven employees were present, namely, Bishop, Billups, Brown, Long, Hachenberg, Hennegar, and Curtis (R. 46). These were the seven whom the Board found had designated the Union as their bargaining representative. Bishop, who likewise testified as to the November 16 meeting, agreed that seven employees were present but in naming the seven included the name of McCoy and omitted the name of Hennegar (R. 131). McCoy, as already noted, p. 6, was not a Union adherent. Hennegar, on the other hand, testified that he had signed and mailed in a union authorization card (R. 184).

ployees in violation of Section 8 (a) (1) of the Act by offering them inducements, such as a coffee break and a wage increase, as a reward for repudiating union representation; by participating in and fostering the anti-union petition of January 12, 1956; and by Foreman Thrash's veiled threat of plant closure in the event of unionization (R. 24, 32). The Board found further, likewise in accord with the Trial Examiner, that on January 4, when the Union requested recognition, and thereafter, the Union had been designated by a majority of the employees in an appropriate unit, that respondent neither entertained nor expressed any good faith doubt as to the Union's majority status, but with full knowledge of the Union's claim engaged on January 11 and thereafter in a program designed to destroy the Union's majority and to supplant collective bargaining with individual bargaining, in violation of Section 8 (a) (5) and (1) of the Act (R. 17–23, 32–34).

Accordingly, the Board ordered respondent to cease and desist from engaging in the unfair labor practices found and from like or related unfair labor practices. Affirmatively, the Board ordered respondent to bargain collectively with the Union upon request and to post appropriate notices (R. 34–36).

ARGUMENT

I. Substantial evidence on the record considered as a whole supports the Board's finding that respondent unlawfully interfered with the organizational rights of its employees in violation of Section 8 (a) (1) of the Act

Frank S. Parker, respondent's vice-president and general manager of its branch operations, was ad-

mittedly aware when he addressed the Central Point employees on January 11, 1956, that the Union claimed majority status, recognition, and bargaining rights (*supra,* p. 3). Parker did not challenge the Union's claim to majority status. Instead, while professing neutrality toward union organization in general, Parker told the assembled employees that there was dissension in the plant, that unionization gave rise to a train of evils, and that since respondent's doors were always open to the receipt of grievances, the employees had no need of a union. Parker underscored these remarks by asking the employees at the meeting individually to voice their complaints, and in response to such complaints forthwith instituted a coffee break and undertook to "take care of [a paid holiday complaint] right there." Even more significantly, Parker utilized this occasion to inform the employees that respondent had earlier determined upon a wage increase applicable to all plants, but that institution of the wage increase at Central Point was doubtful because of the Union. The Board was plainly warranted in concluding that Parker's conduct was designed to frustrate the organizational efforts of the employees, to point out the advantages of foregoing union representation, and to emphasize that unionization was endangering a proposed wage increase. Extended citation of authority to establish the unlawful character of Parker's conduct, even considered apart from the coercive character of Foreman Thrash's observation that a previous organizational effort had resulted in plant closure, is patently un-

necessary. See *N. L. R. B.* v. *Idaho Egg Producers,* 229 F. 2d 821 (C. A. 9).

In the setting of Parker's speech and the ensuing interviews which Foreman Thrash conducted, and particularly in the context of a proposed wage increase which, according to respondent, was rendered doubtful because of the Union,[5] it was readily forseeable that the employees would be receptive to a suggestion to repudiate the Union. Such a suggestion arose out of conferences between Foreman Thrash and two employees, and a petition repudiating the Union was prepared with the use of Company facilities and was posted next to the Company's time clock. Even then only two non-union adherents signed the petition and the remaining seven signers—all Union adherents—affixed their sigatures only after being so advised by the Union (*supra,* p. 6). Respondent's participation in and fostering of the anti-union petition was, like its antecedent conduct, an obvious effort to interfere with the organizational efforts of its employees and to destroy the Union's majority status. *N. L. R. B.* v. *Parma Water Lifter Co.,* 211 F. 2d 258, 261–262 (C. A. 9), certiorari denied, 348 U. S. 829.

[5] The sincerity of respondent's protestations regarding the proposed wage increase is doubtful on two scores. In the first place, Parker admittedly made no mention of the proposed wage increase at the other Oregon plants which he visited on the same tour. Moreover, respondent made no effort to consult with, or even inform, the Union of its proposal although, as later events revealed, the Union was wholly amenable to the granting of a wage increase.

II. Substantial evidence on the record considered as a whole supports the Board's finding that respondent refused to bargain with the Union, in violation of Section 8 (a) (5) of the Act

The foregoing facts, in large part undisputed, establish not only respondent's unlawful interference with the rights guaranteed employees by Section 7 to organize and bargain collectively through representatives of their own choosing; they also establish, as the Board and Trial Examiner found (R. 17–23, 32–34), respondent's unlawful refusal to bargain. As already observed, p. 3, respondent admits that at the time of Parker's speech to the assembled employees on January 11 and Foreman Thrash's interviews immediately thereafter, all culminating in the anti-Union petition of January 12, respondent was aware of the Union's claim to exclusive recognition. Respondent, however, expressed no doubt as to the validity of the Union's claim but rather launched on a course of conduct designed to destroy the Union's majority status.

Respondent does not seriously controvert the findings relating to its conduct. It does assert, however, that the record fails to support the Board's finding that the Union represented a majority of the employees comprising the appropriate unit. Accordingly, it argues that no obligation to bargain existed and a refusal to bargain allegation cannot be sustained.

As the record shows (*supra,* p. 7), six of the 12 employees comprising the appropriate unit testified

that they had authorized the Union to represent them.[6] Respondent places its principal reliance therefore on an alleged insufficiency of proof that Richard Hachenberg, the seventh employee, had likewise designated the Union as his choice for bargaining representative. In this connection, uncontroverted evidence (*supra*, pp. 7–8) establishes that Hachenberg on the evening of November 16 handed Bishop a Union authorization card on which Hachenberg had designated the Union as his bargaining representative. Pursuant to Hachenberg's direction, Bishop delivered the signed authorization card to Whiteside at the Union meeting held that night. Uncontroverted evidence establishes further that Hachenberg later put in his appearance at the Union meeting. Finally, uncontroverted evidence establishes that on the morning of January 13, in answer to Hachenberg's inquiry, Bishop transmitted Whiteside's advice that all Union adherents should for their own protection sign the antiunion petition posted the previous day and that Hachenberg, together with the other six Union adherents, complied with this suggestion. Upon these facts and the whole record, the Board concluded that Hachenberg had, on November 16 and all relevant times thereafter, designated the Union to represent him.

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[6] Whiteside, the Union representative, had lost or mislaid the authorization cards and they were not produced at the hearing (R. 21; 44–45). The Board correctly noted, however (R. 33), that "the testimony of the employees involved is itself probative of the Union's majority status." See *Idaho Egg Producers*, 111 NLRB 103, 107, enforced by this Court, 229 F. 2d 821; and see also *N. L. R. B.* v. *Parma Water Lifter Co.*, 211 F. 2d 258, 261 (C. A. 9), certiorari denied, 348 U. S. 829.

Respondent's complaint in essence is that there was no "direct proof" of Hachenberg's designation. As already shown, Hachenberg's direct testimony was unavailable because he was on National Guard duty at the time of the hearing. Respondent, however, cites no authority to establish that such direct testimony is a prerequisite to a finding that Hachenberg had designated the Union as his representative. Indeed, available authority is to the contrary, especially where as here respondent raised no challenge at the time the Union made its claim of majority status. *N. L. R. B.* v. *Trimfit of California,* 211 F. 2d 206, 210 (C. A. 9); *N. L. R. B.* v. *Parma Water Lifter Co.,* 211 F. 2d 258, 261 (C. A. 9), certiorari denied, 348 U. S. 829, and cases there cited. And see *A. N. P. A.* v. *N. L. R. B.,* 193 F. 2d 782, 805 (C. A. 7), certiorari denied, 344 U. S. 812.

Respondent can draw no comfort from the fact that the antiunion petition was ultimately signed by nine employees, or a majority of those constituting the appropriate unit. As this Court said in the *Idaho Egg* case, *supra,* 229 F. 2d at 823–824,

> an employer may not set up as a justification for its refusal to bargain with a union the defection of union members which it had itself induced by unfair labor practices, even though the consequence is that the union no longer has the support of a majority. In such circumstances the employer will be required to bargain notwithstanding that the union does not presently have a majority. *N. L. R. B.* v. *Parma Water Lifter Co.,* 9 Cir., 211 F. 2d 258.

CONCLUSION

The Board's order should be enforced.

Respectfully submitted,

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JULY 1958.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U. S. C., Sec. 151, *et seq.*), are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district

court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of

Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * *

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